

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	FOIA Control No. 2010-379
SKYBRIDGE SPECTRUM FOUNDATION)	
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 2012

Released: March 30, 2012

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny an Application for Review (New AFR) by Skybridge Spectrum Foundation (Skybridge), of a decision by the Wireless Telecommunications Bureau (WTB) granting in part and denying in part a Freedom of Information Act (FOIA) request by Skybridge. We uphold WTB's decision to withhold portions of the material requested as confidential financial or commercial information under FOIA Exemption 4.

II. BACKGROUND

2. Skybridge's FOIA request¹ sought records regarding an investigation of Maritime Communications/Land Mobile, LLC (MCLM); two related entities, Wireless Properties of Virginia, Inc. (WPV), and MariTel, Inc. (MariTel); and two individuals associated with these entities, Donald and Sandra DePriest (collectively, the Subjects). The investigation resulted in the designation of a hearing proceeding against MCLM inquiring into a variety of alleged misconduct in connection with Auction 61, in which MCLM had acquired several wireless radio licenses.² Specifically, Skybridge sought records relating to three letters, dated August 18, 2009, sent by WTB concerning the Subjects' license applications,³ and three letters of inquiry, dated February 26, 2010, sent by the Enforcement Bureau (EB).⁴ Skybridge sought four categories of records relevant to the six letters: (1) the Subjects' responses to the six letters, (2) all correspondence between FCC personnel and the Subjects and their agents, (3) all internal correspondence between personnel of WTB and personnel of EB, and (4) correspondence between FCC personnel and personnel of other government agencies.⁵

¹ See e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Apr. 19, 2010) (Request).

² See *Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd 6520 (2011).

³ See Letters from Scot Stone, Deputy Chief, Mobility Division, to Dennis C. Brown and Sandra DePriest, MCLM; to Donald DePriest, WPV; and to Jason Smith and Russell H. Fox, MariTel (Aug. 18, 2009).

⁴ See Letters from Gary Schonman, Special Counsel, Investigations and Hearing Division, Enforcement Bureau, to Donald DePriest, WPV; to Sandra DePriest, MCLM; and to Jason Smith, MariTel (Feb. 26, 2010).

⁵ See Request at 1-2.

3. In its initial response,⁶ WTB addressed each category of documents requested by Skybridge. As to category 1,⁷ WTB noted that Skybridge had been copied on the three EB letters and the Subjects' responses. WTB further noted that, in response to an earlier FOIA request by Skybridge (FOIA No. 2009-645),⁸ WTB had released the three WTB letters, the Subjects' responses, and an e-mail chain. Accordingly, WTB found that there were no documents responsive to category 1 other than those already in Skybridge's possession. WTB explained that some of the information contained in the Subjects' responses to the letters had been redacted from the copies of the documents previously released to Skybridge because the Subjects had claimed that this material was confidential. WTB informed Skybridge that, if it wanted to obtain disclosure of the redacted information, it "should proceed under section 0.459(d)(1) of the Commission's rules."⁹

4. With respect to category 2, WTB found no correspondence between the FCC and the Subjects (or their agents) other than the documents responsive to category 1. Regarding category 3, WTB withheld all internal FCC e-mail correspondence under FOIA Exemption 5¹⁰ as attorney work-product and predecisional/deliberative material.¹¹ WTB found no documents responsive to category 4.¹²

5. Skybridge filed an Application for Review of the Initial Response, asserting that WTB did not provide adequate justification for failing to release any material in response to Skybridge's FOIA Request.¹³ Skybridge argued that WTB had not made a sufficient showing to justify withholding assertedly confidential material under FOIA Exemption 4.¹⁴ Skybridge further argued that WTB had applied Exemption 5 in an improper, conclusory manner.¹⁵

6. Upon review of Skybridge's challenge to WTB's application of Exemption 4 and Exemption 5, the Office of General Counsel (OGC) in consultation with WTB determined that it would be appropriate and efficient to issue a Supplemental Response to reconsider these issues and to make any further release determined to be appropriate.¹⁶ As provided by 47 C.F.R. § 0.461(c)(3), WTB notified MCLM, WPV, and MariTel of Skybridge's FOIA Request and gave them the opportunity to submit their

⁶ See Letter from Scot Stone, Deputy Chief, Mobility Division to Warren Havens (Jun. 2, 2010) (Initial Response).

⁷ See *id.* at 1-2.

⁸ See Letter from Scot Stone, Deputy Chief, Mobility Division to Warren Havens (Oct. 27, 2009).

⁹ See Initial Response at 1-2. WTB apparently meant section 0.457(d)(1) (47 C.F.R. § 0.457(d)(1)), which requires parties seeking disclosure of confidential information to make a persuasive showing to justify disclosure.

¹⁰ See 5 U.S.C. § 552(b)(5). Exemption 5 covers "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

¹¹ See Initial Response at 3.

¹² See *id.*

¹³ See Application for Review of Freedom of Information Act Action, filed July 2, 2010, by Skybridge (Original AFR).

¹⁴ See Original AFR at 10-15. See also 5 U.S.C. § 552(b)(4), which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Although WTB did not expressly cite Exemption 4 in its Initial Response, Skybridge correctly observed the relevance of Exemption 4 to WTB's decision to withhold material as confidential.

¹⁵ See Original AFR at 15-17.

¹⁶ See Letter from Joel Kaufman, Associate General Counsel to Warren Havens (Jun. 8, 2011), *citing* 47 C.F.R. § 0.461(j) Note.

views with respect to the confidentiality issue.¹⁷ After receiving submissions on the confidentiality issue from MCLM, WPV, MariTel, and Skybridge, WTB issued a Supplemental Response, which further addressed the Exemption 4 and Exemption 5 issues.¹⁸

7. In the Supplemental Response, WTB supplied an express analysis of the applicability of Exemption 4, which it had not done in the Initial Response, and determined that only some portions of the material originally redacted from the category 1 documents submitted by MCLM, WPV, and MariTel, should continue to be redacted under FOIA Exemption 4 as confidential.¹⁹ WTB found that disclosure of this withheld material would cause substantial harm to the competitive position of the person from whom the information was obtained, making specific findings with respect to the portions of each document that MCLM, WPV, and MariTel claimed were confidential.²⁰

8. The Supplemental Response also identified six e-mail chains involving internal Commission correspondence between personnel of EB and WTB as responsive to category 3 of Skybridge's request.²¹ WTB withheld three chains in their entirety and withheld portions of two others under FOIA Exemption 5. WTB found that the exempt material fell within the scope of the deliberative process privilege of Exemption 5,²² in that it contained internal deliberations, analysis, and opinion that was part of the decision-making process that could not meaningfully be segregated from non-exempt factual material. WTB further found that discretionary release of exempt material was not appropriate.

9. WTB stated that in light of the Supplemental Response, it believed that Skybridge's pending Original Application AFR was moot because the Supplemental Response superseded the Initial Response.²³ In view of this finding, WTB informed Skybridge that, unless Skybridge indicated to the contrary, WTB would assume that Skybridge wished to withdraw its Original AFR.²⁴

10. On October 5, 2011, Skybridge filed the New AFR, which appeals the Supplemental Response.²⁵

¹⁷ See Letter from Scot Stone, Deputy Chief, Mobility Division to Dennis C. Brown, Counsel to MCLM (May 19, 2011); Letter from Scot Stone, Deputy Chief, Mobility Division to Dennis C. Brown, Counsel to WPV (May 19, 2011); Letter from Scot Stone, Deputy Chief, Mobility Division to Jason D. Smith, President and CEO, MariTel (May 19, 2011).

¹⁸ See Letter from Roger Noel, Chief, Mobility Division to Dennis C. Brown, Jason D. Smith, and Warren Havens (Sept. 21, 2011) (Supplemental Response).

¹⁹ See Supplemental Response at 3-8.

²⁰ See *id.* at 4-8, citing *National Parks & Cons. Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). WTB also redacted material pursuant to FOIA Exemption 6, which Skybridge does not appeal.

²¹ See Supplemental Response at 8-10.

²² See *id.*, citing *inter alia*, *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975).

²³ See Supplemental Response. at 10-11.

²⁴ See *id.* at 11.

²⁵ WTB established a 10-day deadline for appealing the Exemption 4 issue and a 30-day deadline for appealing the Exemption 5 issue. See Supplemental Response at 10; 47 C.F.R. §§ 0.461(i)(1) (10-day limit), 0.461(j) (30-day limit). Skybridge filed an Application for Review within the time frame for appealing the Exemption 4 issue. See Application for Review: Review of Freedom of Information Act Action, filed October 5, 2011, by Skybridge (New AFR). To ensure that we have fully considered Skybridge's objections, we also consider two related submissions by Skybridge, referenced in notes 28 and 30 below, to the extent they clarify the points made in the New AFR. Skybridge made no filing or claim addressing the Exemption 5 issue and accordingly we do not further address it.

III. APPLICATION FOR REVIEW

11. In its New AFR, Skybridge challenges WTB's withholding of material under Exemption 4 on several grounds. Skybridge contends that WTB had no authority to issue the Supplemental Response or treat Skybridge's Original Application for Review as moot and that the Commission should have instead granted Skybridge's Original Application for Review and released all of the requested material.²⁶ Skybridge further contends that Exemption 4 cannot be applied to withhold as confidential information required to be submitted as part of a public filing, such as a license application.²⁷ Additionally, Skybridge asserts that MCLM, WPV, and MariTel cannot be permitted to claim confidentiality because they are companies not individuals,²⁸ because the individuals purporting to act on behalf of MCLM have not established their authority to do so,²⁹ and because the material requested discloses MCLM's fraudulent activities.³⁰ Skybridge also argues that the Commission cannot withhold the documents because they disclose the Commission's own misconduct in approving fraudulent licenses.³¹ Finally, Skybridge claims that it is entitled to the documents requested because it is a party to the enforcement proceeding against MCLM.³²

IV. DISCUSSION

12. We find that WTB's Supplemental Response is an appropriate means of resolving the issues raised by Skybridge in its Original AFR, which raised significant objections to WTB's analysis of Exemptions 4 and 5 in the Initial Response. The Supplemental Response was consistent with the Commission's rules and provided a vehicle for correcting the asserted deficiencies in WTB's prior application of Exemptions 4 and 5 without the need for involvement by the full Commission.

13. Pursuant to 47 C.F.R. § 0.461, Note to Paragraph (i) and (j), "[t]he General Counsel may review applications for review with the custodian of the records [in this case WTB] and attempt to informally resolve outstanding issues with the consent of the requester." Having found that Skybridge's Original AFR raised issues about the application of Exemptions 4 and 5 that could be resolved by issuing a supplemental response, OGC and WTB were justified in attempting to obtain Skybridge's consent to this procedure. While Skybridge did not consent, we find this of no consequence. Our action here to deny the New AFR makes clear that, if we had ruled on the Original AFR in Skybridge's favor, we would similarly have directed WTB to make a supplemental response to the FOIA request that was consistent with what WTB actually chose to do by issuing its Supplemental Response.

14. We further find that Skybridge has not identified any specific issues raised in its Original Application for Review that remain unresolved, inasmuch as the Supplemental Response provides the full

²⁶ See New AFR at 2-4.

²⁷ See *id.* at 5-6.

²⁸ See e-mail from Warren Havens to Michael Connelly (Sept. 23, 2011) at ¶ 3.

²⁹ See *id.* at ¶ 2.

³⁰ See New AFR at 6, *referencing* Consolidated Reply to Responses, filed June 17, 2011, by Skybridge (Consolidated Reply) at 6-7.

³¹ See Consolidated Reply at 7-8.

³² See New AFR at 4-5.

analysis of the Exemption 4 and 5 issues that Skybridge claimed was missing from the Initial Response.³³ We conclude that WTB was justified in assuming that Skybridge would no longer wish to prosecute its Original Application for Review absent an indication from Skybridge that specific issues raised in the Original Application for Review needed to be addressed despite the issuance of the Supplemental Response.³⁴ Further, given that WTB's Supplemental Response superseded its Original Response and resolved the analytic defects alleged in the Original Application for Review, we find that Skybridge's Original Application for Review is moot and dismiss it as such.

15. Moving to the issues raised in Skybridge's New Application for Review, we find no merit to Skybridge's various challenges to WTB's application of Exemption 4 to withhold portions of the responsive documents that WTB found would cause competitive harm to the submitters of the documents, if disclosed. Exemption 4 provides that an agency may withhold "commercial or financial information obtained from a person and privileged or confidential."³⁵ Skybridge does not dispute WTB's findings that the redacted information is third party commercial or financial information the release of which would cause competitive harm. Instead, Skybridge challenges WTB's application of Exemption 4 on a variety of other grounds. We disagree with Skybridge's assertion that Exemption 4 is not applicable to corporations because the statute provides that it applies to "trade secrets and commercial or financial information obtained from a *person* and privileged or confidential." [*emphasis added*]³⁶ Contrary to Skybridge's suggestion, the term "person" in Exemption 4 applies to MCLM, WPV, and MariTel, because both corporations and individuals are defined as "persons" by the Administrative Procedure Act, of which the FOIA is a part.³⁷

16. We also reject Skybridge's assertion that the Commission must ascertain whether individuals claiming confidentiality for a corporation have the authority to act on behalf of the corporation. Issues of corporate authority are generally matters within the jurisdiction of the state courts, not ones decided in the first instance by the Commission.³⁸

³³ We find no merit to Skybridge's suggestion that, because the Commission did not deny Skybridge's original application for review, this implies that all responsive documents must now be released in full. Even when the Commission grants an application for review, the result may be a remand for further consideration. *See* 47 C.F.R. § 1.115(h)(1)(ii) (authorizing remand to the designated authority with instructions). Skybridge has no basis to expect more than it would have been entitled to receive had the Commission ruled favorably on Skybridge's Original Application for Review. Moreover, we disagree with Skybridge's suggestion (Consolidated Reply at 3-4) that any deficiencies in the claims of confidentiality initially asserted by MCLM, WPV, and MariTel waived any subsequent opportunity to clarify or supplement its showing. We find that WTB appropriately exercised its discretion to fully explore the issue of confidentiality. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24830 ¶ 19 (1998) (the Commission may find on its own motion that specific materials are confidential).

³⁴ In view of WTB's disclosure of additional material, it is unclear whether Skybridge wishes to pursue an argument made in its Original Application for Review that WTB should have disclosed certain material even though Skybridge had already received courtesy copies. *See* Original AFR at 17-19. If Skybridge wishes to receive additional copies of this material, we direct WTB to provide them and to charge Skybridge for duplication.

³⁵ *See* 5 U.S.C. § 552(b)(4).

³⁶ *See id.*

³⁷ *See* 5 U.S.C. § 551(2) (definition of "person"); *see also* *FCC v. AT&T, Inc.*, 131 S.Ct. 1177, 1185 (2011) (Exemption 4 "clearly applies to corporations"); *Skybridge Spectrum Foundation v. FCC*, Civil Action No. 10-01496 (CKK) (D.D.C. Feb. 2, 2012), Memorandum Opinion at 21-22 (treating MCLM as a person under Exemption 4).

³⁸ *See Clark Lift of San Jose, Inc.*, 15 FCC Rcd 46616, 4618 ¶ 6 (PSHSB 2000) (declining to question apparent authority of employee to sign assignment application). *See also* *Station KGA, Spokane, Washington*, 26 FCC 2d 204 (1970) (Commission leaves question of whether licensee's debts were authorized to local courts).

Skybridge also errs in asserting that Exemption 4 does not apply to information that MCLM, WPV, and MariTel were required to submit to the Commission in connection with Auction 61.³⁹ Skybridge misconstrues the meaning of *Critical Mass Energy Project v. NRC*,⁴⁰ upon which it relies in asserting that Exemption 4 does not apply to information that the government requires to be submitted in connection with public filings. In *Critical Mass*, the court determined that the two-part test under *National Parks and Conservation Association v. Morton*⁴¹ for determining the confidentiality of financial or commercial information in the government's possession was not applicable to documents submitted to the government voluntarily.⁴² The court reaffirmed, however, the use of the two-part test to determine whether commercial or financial matter is confidential with respect to documents submitted to the government under compulsion.⁴³ Under this test, records are considered confidential if disclosure would be likely to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.⁴⁴ Here, consistent with the standard reaffirmed in *Critical Mass*, WTB made a finding that release of the material MCLM, WPV, and MariTel were required to disclose would cause competitive harm.⁴⁵

17. Additionally, we disagree with Skybridge's contention that the specific facts of this case bar the application of Exemption 4. We have previously rejected Skybridge's argument that, because MCLM and others allegedly committed fraud, they may not obtain the benefits of Exemption 4.⁴⁶ Skybridge gives us no reason to reexamine that ruling. Similarly, Skybridge has fallen far short of demonstrating that release of confidential material is warranted by its allegations of Commission misconduct. As the D.C. Circuit held in evaluating an analogous argument for not applying Exemption 7(C), "[a] mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by [the exemption]."⁴⁷ Skybridge's unsupported allegations do not support waiver of the interests protected by the exemption..

18. Finally, Skybridge has not shown that its status as a party to the enforcement proceeding gives it special entitlement to disclosure under the FOIA. While the Commission's discovery rules generally require parties seeking Commission records to file a FOIA request,⁴⁸ the FOIA provides no mechanism for the release of FOIA-exempt documents to selected persons under a protective order, because disclosure under the FOIA is effectively disclosure to the public at large.⁴⁹ The release of

³⁹ See Consolidated Reply at 5-6.

⁴⁰ 975 F.2d 871 (D.C. Cir. 1992).

⁴¹ 498 F.2d 765 (D.C. Cir. 1974)

⁴² 975 F.2d at 872. Specifically, the court found that information given to the government voluntarily would be treated as confidential under Exemption 4 "if it is of a kind that the provider would not customarily make available to the public." *Id.*

⁴³ 975 F.2d at 878-79.

⁴⁴ 975 F.2d at 878.

⁴⁵ See *supra* para. 7.

⁴⁶ See *Skybridge Spectrum Foundation*, 25 FCC Rcd 11064, 11067-70 ¶¶ 5-13 (2010) (holding that there is no "fraud exception" to Exemption 4). See also *Skybridge Spectrum Foundation v. FCC*, Civil Action No. 10-01496 (CKK) (D.D.C. Feb. 2, 2012), Memorandum Opinion at 26 (fraud exception is legally unsupported and unworkable).

⁴⁷ See *Computer Professionals for Social Responsibility v. U.S. Secret Service*, 72 F.3d 897, 905 (D.C. Cir. 1996).

⁴⁸ See 47 C.F.R. § 1.325(b).

⁴⁹ See *National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2003).

documents to the parties to hearing proceedings subject to a protective order is authorized by a separate provision that gives the presiding judge authority to control discovery.⁵⁰ Thus, to the extent that Skybridge seeks material that would not be released under the FOIA, it must proceed under the terms of the presiding judge's protective order.

19. The protective order issued in the enforcement proceeding⁵¹ applies to, *inter alia*, "documents that have been provided to the Federal Communications Commission . . . in connection with any investigation concerning [MCLM] that pre-dated this proceeding."⁵² It thus covers the confidential material that Skybridge seeks. The protective order also describes procedures for obtaining access to confidential information.⁵³ To the extent Skybridge wishes to rely on its status as a party to gain access to confidential information, it must proceed in accordance with these procedures.

V. ORDERING CLAUSE

20. ACCORDINGLY, IT IS ORDERED, that the Original Application for Review by Skybridge Spectrum Foundation IS DISMISSED as moot and the New Application for Review IS DENIED. Skybridge may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).⁵⁴ The officials responsible for this action are the following: Chairman Genachowski and Commissioners McDowell and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁰ See 47 C.F.R. § 1.313.

⁵¹ See Protective Order in EB Docket No. 11-71, FCC 11M-21 (Jul. 22, 2011).

⁵² See *id.* at 1.

⁵³ See *id.* 6-7.

⁵⁴ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Skybridge's right to pursue litigation. Skybridge may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - Room 2510
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 877-684-6448.